

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of A.A. Avenue
Grocery, WIC Vendor No. 7259

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

The above-entitled matter came on for hearing before Administrative Law Judge Kenneth A. Nickolai at 9:30 a.m. on May 24, 2000, in the Chesley Room of the Minnesota Department of Health Building, 717 Delaware Street S.E., Minneapolis, Minnesota. The record closed in this matter at the end of the hearing.

Jennifer L. Beens, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130, appeared at the hearing on behalf of the Minnesota Department of Health (hereinafter "the Department"). Abderrahmane Deriche, Owner of A.A. Avenue Grocery, 682 Selby Avenue, Saint Paul, Minnesota 55104, appeared at the hearing on his own behalf.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Health will make a final decision in this matter after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minnesota law,^[1] the Commissioner may not make her final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file exceptions and present argument to her. Parties should contact the office of Jan Malcolm, Commissioner of Health, 85 East 7th Place, Suite 400, St. Paul, Minnesota 55101, to find out how to file exceptions or present argument.

STATEMENT OF ISSUES

(1) Whether A.A. Avenue Grocery committed Class A violations by charging the WIC program for foods not received by a person presenting a WIC voucher to the store or, alternatively, by charging more money for items than its usual and customary charges for those items; and

(2) If so, whether the Department should disqualify A.A. Avenue Grocery from participating in the WIC program for three years.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) Program is a program to provide pregnant women, nursing mothers, infants, and children up to the age of five with nutritional supplements and other health care services. The program is federally funded, managed by the state, and administered locally by approximately 70 WIC clinics throughout the state.^[2]

2. WIC clinics provide eligible women and children (participants) with identification cards and vouchers that can be redeemed for specific kinds of food products from authorized vendors.^[3] Program rules require participants (or other persons specifically authorized) to sign the identification cards. Participants then receive vouchers, each bearing a unique identification number and listing food items that the participant is entitled to receive.^[4] There are spaces on the vouchers for the vendor to record the price charged for the food items received by the participant, for the signature of the participant or proxy, and for the vendor's WIC stamp.^[5] A participant may choose to receive all or only some of the food items listed on the voucher, but the vendor may only charge the program for the food items that the participant actually receives.^[6]

3. A Retail Food Vendor Agreement (hereinafter "Agreement") is executed between the Department and the owner of a food store when the food store becomes authorized to receive WIC vouchers. The Agreement sets out the terms of the food store's participation in the WIC program and sets out penalties for failing to comply with various program requirements. The Department issues each qualifying food store a WIC vendor stamp bearing a unique vendor number.^[7] The stamp is used to identify each voucher that the store receives. Use of the stamp on a voucher is required for the WIC vendor to receive payment on that voucher.^[8] The Department periodically requires all of its WIC vendors to receive training on the program's various requirements.^[9]

4. The Agreement^[10] requires that each transaction between a WIC vendor and an individual participant using a voucher occur in certain ways. The participant can only use a WIC voucher to obtain the kinds of food items listed on the voucher. The particular brands must be pre-approved by the Department. Where the foods are staples, such as milk, eggs, and cheese, only amounts and type of food is specified. The vendor may only charge the program for the food items the participant selects and actually receives.^[11]

5. When the participant purchases the food items using a voucher, the foods items are presented at the checkout in the same manner as if the participant were paying by check. The vendor arrives at the total price of the items. The vendor may not

charge more for each food item than the price listed in its Agreement with the Department.^[12] The participant then presents the voucher to the vendor, who records the total price on the voucher. The participant then signs the voucher.^[13] After the voucher is signed, the vendor compares the signature on the voucher with the signatures on the participant's WIC identification cards.^[14]

6. A.A. Avenue Grocery is a small grocery store located at 682 Selby Avenue in St. Paul, owned by Mr. Abderrahmane Deriche. There was an Agreement in effect between A.A. Avenue Grocery and the Department between May 1, 1999, and April 30, 2000.^[15]

7. In 1999, the Department decided to conduct random compliance buys, using undercover agents, at WIC vendors in Ramsey County.^[16] These compliance buys were performed at every WIC vendor in Ramsey County. The Department's employees and agents conducted those compliance buys according to a series of predetermined standard operating procedures. An undercover agent and the Department's compliance manager would drive to a location about two blocks from the WIC vendor and park their car. The investigator would then turn over to the compliance manager any WIC vouchers, food stamps, or cash that might be in his or her possession. Next, the compliance manager would give the investigator one WIC identification card with a fictitious identity. The investigator had previously written the signature of the fictitious person on the identification card. The compliance manager would also give the investigator one WIC voucher that could be redeemed for the foods specified on it. The compliance manager would then record the time when the investigator left the car to go to the WIC vendor's store.^[17]

8. The Department also established standard operating procedures to govern what an investigator would do after entering a WIC vendor's store. After entering the store, the investigator would proceed to collect food items, and bring them to the cashier to be rung up. The foods that the investigator would bring to the cashier would commonly include some items that were not specifically approved by the WIC program, and the investigator would commonly omit some food items described on the WIC voucher. The investigator would then present the WIC voucher in his or her possession to the cashier. It was then the responsibility of the cashier to record the total price on the voucher of the foods presented for purchase before returning the voucher for the investigator's signature. The investigator would not produce the WIC identification card for comparison of signatures unless requested. After signing the WIC voucher and returning it to the cashier, the investigator would allow the cashier to bag the groceries and then would leave the store, proceeding directly to the car where the compliance manager was waiting.^[18]

9. The Department's standard operating procedures for compliance buys also covered what would occur when the investigator returned to the car with the bag or bags of groceries. The compliance manager would record the time when the investigator returned to the car. He or she would then prepare a written inventory of the food items that the investigator had brought back from the store and place a slip of paper in each bag of groceries identifying the WIC vendor from which the items had

been purchased. The investigator and the compliance manager would then complete a written report of the results of their investigation.^[19] The food items were kept separate from any food items that may have been purchased from other vendors on the same day. At the end of the day, the compliance manager and the investigator would bring the food items to a charitable institution for donation. There, the food items were inventoried again, photographed, and then donated.^[20]

10. As part of the Department's compliance program, an undercover investigator employed by the Department conducted a compliance buy at A.A. Avenue Grocery on January 5, 2000. The WIC Investigator and the Department's compliance manager followed all of the standard operating procedures described in Findings Nos. 7, 8 and 9. During that compliance buy, the investigator brought to the cashier one gallon of milk, one dozen eggs, two 13-ounce packages of Kix cereal, one box of Capt'n Crunch cereal, two 46-ounce cans of Juicy Juice, and one pound of cheese.^[21] The items purchased did not include 18 ounces or less of peanut butter and two 12-ounce cans of frozen juice, which the voucher indicated could have been purchased. The Capt'n Crunch cereal was not a WIC-approved food item.^[22] During the compliance buy, the cashier at A.A. Avenue Grocery did not enter a total price for the food items on the WIC voucher before returning it to the WIC Investigator for signature. The cashier did compare the investigator's signature on the WIC voucher with the signatures on the investigator's WIC identification card.^[23]

11. The WIC voucher used in the January 5, 2000 compliance buy was processed for payment by the Department's bank and returned to the compliance manager.^[24] Based on the prices that the compliance manager obtained during a later monitoring visit and recorded on a Compliance Monitoring Price Checklist,^[25] the dollar food value of the items purchased totaled \$21.33. The total amount entered on voucher used in the compliance buy and bearing the stamp of A.A. Avenue Grocery was \$29.04.^[26] The voucher was redeemed by A.A. Avenue Grocery for \$7.71 more than the cost of the food actually purchased.^[27]

12. The WIC Investigator conducted another compliance buy at A.A. Avenue Grocery on January 25, 2000. The WIC Investigator and the Department's compliance manager followed all of the standard operating procedures described in Findings Nos. 7, 8 and 9. During that compliance buy, the investigator brought to the cashier one gallon of milk, one dozen eggs, two 13-ounce packages of Kix cereal, and two 46-ounce cans of Juicy Juice.^[28] The items purchased did not include 18 ounces or less of peanut butter, two 12-ounce cans of frozen juice, and one pound of cheese, which the voucher indicated could have been purchased. During the compliance buy, the cashier at A.A. Avenue Grocery did not enter a total price for the food items on the WIC voucher before returning it to the investigator for signature. The cashier did not compare the investigator's signature on the WIC voucher with the signatures on the investigator's WIC identification card.^[29]

13. The WIC voucher used in the January 25, 2000 compliance buy was processed for payment by the Department's bank and returned to the compliance manager.^[30] Based on the prices that the compliance manager obtained during a later

monitoring visit and recorded on a Compliance Monitoring Price Checklist,^[31] the dollar food value of the items purchased totaled \$17.34. The total amount entered on voucher used in the compliance buy and bearing the stamp of A.A. Avenue Grocery was \$28.02.^[32] The voucher was redeemed by A.A. Avenue Grocery for \$10.68 more than the cost of the food actually purchased.^[33]

14. The WIC Investigator conducted another compliance buy at A.A. Avenue Grocery on February 24, 2000. The WIC Investigator and the Department's compliance manager followed all of the standard operating procedures described in Findings Nos. 7, 8 and 9. During that compliance buy, the investigator brought to the cashier one gallon of milk, one dozen eggs, two 13-ounce packages of Kix cereal, and two 12-ounce cans of frozen juice.^[34] The items purchased did not include 18 ounces or less of peanut butter, two 46-ounce cans of fruit juice, and one pound of cheese, which the voucher indicated could have been purchased. During the compliance buy, the cashier at A.A. Avenue Grocery entered a total price for the food items on the WIC voucher as \$28.02 before returning it to the investigator for signature. The cashier did not compare the investigator's signature on the WIC voucher with the signatures on the investigator's WIC identification card.^[35]

15. The WIC voucher used in the February 24, 2000 compliance buy was processed for payment by the Department's bank and returned to the compliance manager.^[36] Based on the prices that the compliance manager obtained during a later monitoring visit and recorded on a Compliance Monitoring Price Checklist,^[37] the dollar food value of the items purchased totaled \$15.54. The total amount entered on voucher used in the compliance buy and bearing the stamp of A.A. Avenue Grocery was \$28.02.^[38] The voucher was redeemed by A.A. Avenue Grocery for \$12.48 more than the cost of the food actually purchased.^[39]

16. On February 29, 2000 and March 21, 2000, the WIC Investigator conducted cash buys of milk, eggs, and canned juice.^[40] These purchases were made to confirm the prices of items sold at A.A. Avenue Grocery.

17. The Department conducted a Vendor Violation Forum to consider the results of the compliance buys and suggest a response by the Department. The number and seriousness of the violations and the potential impact on participants were considered. The Forum recommended a three-year disqualification.^[41]

18. On April 12, 2000, the Department notified A.A. Avenue Grocery by letter that the store was disqualified from participating in the WIC program for a period of three years, effective April 27, 2000. The Department cited the transactions on January 5, January 25, and February 24 where an investigator was charged for food not received during compliance purchases.^[42] The Department did not take any action against A.A. Avenue Grocery for any of the other violations that it found as a result of the compliance buys.^[43] The disqualification letter indicated the manner of taking an administrative appeal and the deadline for filing such an appeal.

19. A.A. Avenue Grocery appealed its disqualification from the WIC program. The Department issued a Notice of and Order for Hearing on May 9, 2000, setting this matter on for hearing before Administrative Law Judge Kenneth A. Nickolai.

20. There are several other WIC vendors in A.A. Grocery's immediate neighborhood, including another WIC vendor on the same block. The Department concluded that disqualifying A.A. Grocery from participating in the WIC program would not create undue hardship for WIC recipients.^[44]

21. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Both Minnesota and federal law give the Administrative Law Judge and the Commissioner of Health authority to consider and rule on the issues in this contested case proceeding.^[45]

2. The Notice of and Order for Hearing were proper in all respects, and the Department has complied with all of the law's other substantive and procedural requirements.

3. The Department has the burden of proving by a preponderance of the evidence A.A. Avenue Grocery committed violations of its retail food vendor agreement and of WIC program rules that justify suspending A.A. Avenue Grocery from participating in the WIC program for a period of three years.^[46]

4. Class A violations are committed by vendors by "charging the WIC program for items not received by a WIC customer."^[47] Vendors who commit two or more Class A violations are subject to disqualification from the WIC program for three years.^[48]

5. Section XI, Part A, of the retail food vendor agreement between the Department and A.A. Avenue Grocery that was in effect from January 5, 2000 through February 24, 2000, provides that the Commissioner shall disqualify the Vendor for the maximum period authorized by federal regulations^[49] if the Vendor commits more than one Class A violation.^[50]

6. A.A. Avenue Grocery charged the Department for food that the investigator did not actually receive during the January 5, January 25, and February 24, 2000 compliance buys. This conduct violates the prohibition against charging the WIC Program for foods not received by a WIC participant.

7. In its retail food vendor agreement, A.A. Avenue Grocery agreed that it would be "fully accountable for the actions of its controlling persons, employees, and agents" with respect to the requirements in that agreement. ^[51]

8. During the period from January 5 through February 24, 2000, A.A. Avenue Grocery demonstrated a pattern of inattention to WIC program requirements.

9. Vendor intent is not an element in violations of WIC program rules or in violations of A.A. Avenue Grocery's retail food vendor agreement.

10. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon these Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATIONS

The Administrative Law Judge recommends:

- (1) That the Commissioner DENY A.A. Avenue Grocery's appeal of its disqualification from participation in the WIC program; and
- (2) That the Commissioner UPHOLD the Department's disqualification of A.A. Avenue Grocery from participating in the WIC Program for a period of three years, effective April 27, 2000.
- (3) That the Commissioner also UPHOLD the Department's disapproval of A.A. Avenue Grocery's application to be re-authorized as a WIC vendor.

Dated this 23rd day of June 2000.

/s/ Kenneth A. Nickolai

KENNETH A. NICKOLAI

Chief Administrative Law Judge

Reported: Tape Recorded (five tapes); No Transcript Prepared.

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NOTICE

Under Minnesota law,^[52] the Commissioner of Health is required to serve her final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

A.A. Avenue Grocery maintains that the Department improperly investigated the store by making too many visits and by not intervening immediately to correct mistakes. The Department indicated that vendors have become more aware of the Department's investigative techniques. Vendors avoid overcharging on vouchers until they are assured that the person is a "regular" and not an undercover investigator. The pattern alleged by the Department was present here. The first voucher presented in a compliance buy (in November, 1999) was processed correctly. The three vouchers demonstrating violations were all submitted for the maximum amount allowable had all the items listed been purchased, even though several items listed on the voucher were not purchased. The Department has shown that a number of visits are required to establish whether procedures are being followed, not to improperly pursue a vendor.

The Department's investigative techniques require waiting for the voucher to be processed prior to alleging violations. A.A. Avenue Grocery asserts that this practice renders impossible any defense against the charges. The vendor suggests that the compliance officer should intervene immediately after an investigator makes an undercover purchase to correct improper practices. The Department noted that vendors are able to change dollar amounts on vouchers until the time the voucher is submitted for payment, thereby precluding any finding of overcharges by a vendor if the Department acts prior to the voucher being submitted.

Vendors are not subject to continuous oversight by the Department. The process of voucher redemption is left to each individual vendor on a day-to-day basis. The Department's investigative techniques recreate ordinary transactions in a controlled fashion. Vendor compliance can be assessed by the results of those transactions. The Department's process is a proper exercise of vendor oversight and that process does not infringe on the rights of vendors.

K.A.N.

^[1] Minnesota Statutes, section 14.61 (1998).

^[2] Testimony of Rick Chiat.

^[3] Testimony of Rick Chiat.

^[4] Exhibits 4-6.

^[5] Testimony of Freddie Marsh-Lott; Exhibits 4-6.

^[6] Testimony of Freddie Marsh-Lott; Exhibit 2, WIC Training Verification; Exhibit 3, paragraph III-B.

^[7] Exhibit 1.

^[8] Exhibit 2, WIC Training Verification; Exhibit 3, paragraph IV-A.

^[9] Testimony of Rick Chiat.

^[10] Exhibit 3.

^[11] Exhibit 3, paragraph III-B.

^[12] Exhibit 3, paragraph III-F.

^[13] Exhibit 3, paragraph III-N.

^[14] Exhibit 3, paragraph III-N.

^[15] Exhibit 3.

^[16] Testimony of Freddie Marsh-Lott.

^[17] Testimony of WIC Investigator. A Protective Order was issued in this matter on May 15, 2000, prohibiting disclosure of the identity of any investigator engaged in WIC compliance buys. To avoid the disclosure of information that is not public pursuant to that Order, the Administrative Law Judge will not refer to the Department's undercover investigators by name. The investigator who testified about the compliance checks in this matter will be referred to as the "WIC Investigator."

^[18] Testimony of WIC Investigator.

^[19] Exhibits 7, 9, 10, and 14.

^[20] Testimony of WIC Investigator and Freddie Marsh-Lott; Exhibits 15-18 20, 22-23, and 26-29.

^[21] Testimony of WIC Investigator; Exhibit 7.

^[22] Testimony of WIC Investigator; Exhibit 7.

^[23] Testimony of WIC Investigator; Exhibit 7.

^[24] Exhibit 4.

^[25] Testimony of Freddie Marsh-Lott; Exhibit 19.

^[26] Exhibit 4.

^[27] Exhibit 19.

^[28] Testimony of WIC Investigator; Exhibit 9.

^[29] Testimony of WIC Investigator; Exhibit 7.

^[30] Exhibit 5.

^[31] Testimony of Freddie Marsh-Lott; Exhibit 21.

^[32] Exhibit 5.

^[33] Exhibit 21.

^[34] Testimony of WIC Investigator; Exhibit 10.

^[35] Testimony of WIC Investigator; Exhibit 10.

^[36] Exhibit 6.

^[37] Testimony of Freddie Marsh-Lott; Exhibit 24.

^[38] Exhibit 6.

^[39] Exhibit 24.

[\[40\]](#) Exhibits 11 and 13.

[\[41\]](#) Exhibit 32.

[\[42\]](#) Exhibit 33.

[\[43\]](#) Testimony of Freddie Marsh-Lott.

[\[44\]](#) Exhibit 32.

[\[45\]](#) Minnesota Statutes, sections 14.57 and 14.69; Title 7, Code of Federal Regulations, section 246.18; and Minnesota Rules, part 4617.0100.

[\[46\]](#) Minnesota Rules, part 4617.0086, subpart 2. A.

[\[47\]](#) Minnesota Rules, part 4617.0086, subpart 3. A.

[\[48\]](#) Minnesota Rules, part 4617.0085, subpart 3. A; Exhibit 3, paragraph XI.A. Title 7, Code of Federal Regulations, section 246.12 (k)(1)(ii) establishes three years as the maximum period of disqualification

[\[49\]](#) That would be the three year disqualification specified in Federal regulation.

[\[50\]](#) Exhibit 3, paragraph XI-A.

[\[51\]](#) Exhibit 3, paragraph XIV.

[\[52\]](#) Minnesota Statutes, section 14.62, subdivision 1.